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BEFORE THE ARIZONA CORPORATION COMMISSION

ARIZONA CORPORATION COMMISSION
SECRETARY GENERAL

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Commissioner

JEFF HATCH-MILLER

Commissioner

KRISTIN K. MAYES

Commissioner

GARY PIERCE

Commissioner

Arizona Corporation Commission

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IN THE MATTER OF THE APPLICATION OF
SEMPRA ENERGY SOLUTIONS FOR A
CERTIFICATE OF CONVENIENCE AND
NECESSITY FOR COMPETITIVE RETAIL
ELECTRIC SERVICE.

DOCKET NO. E-03964A-06-0168

**NEW WEST ENERGY
CORPORATION'S RESPONSE
TO APPLICANT'S MOTION TO
STRIKE**

New West Energy Corporation ("New West") submits its response to Sempra Energy Solutions' ("Sempra") Motion to Strike the testimony submitted by New West and the Residential Utility Consumer Office ("RUCO").

Summary of Argument

Sempra makes a quite novel assertion in its motion: that the Commission may not consider the implications of its decision, but must blindly act only within the narrow confines set forth by the Applicant. Of course, this assertion is contrary to the entire jurisprudence of the Commission's jurisdiction and mandate. Thematic in the cases and authorities is the concept that "certificates of convenience and necessity can only be acquired from the corporation commission by an affirmative showing that its issuance would best serve the public interest" *Pacific Greyhound Lines v. Sun Valley Bus Lines, Inc.*, 70 Ariz. 65, 72, 216 P.2d 404, 409 (1950).

1 The testimonies of Steven Ahearn, Frank Graves and Peter Fox-Penner each
2 address the issue of whether granting Semptra's application at this time and given
3 numerous unresolved issues is in the public interest. Semptra's is not a routine
4 application. It moves Arizona back to a course of retail electric competition prior to
5 study of many outstanding issues. Such a move is premature and would have extreme
6 public policy consequences. It is important for the Commission at this juncture to
7 consider these consequences, both as they relate to the Semptra application and generally.
8 For the reasons set forth below, Semptra's Motion to Strike should be denied.

9 **Argument**

10 **A. Arizona Law Is Clear That The Commission May And Should Consider The** 11 **Public Interest Implications Of Any Application.**

12 The public policy and public interest concerns raised in the testimonies of Stephen
13 Ahearn, Frank Graves and Peter Fox-Penner are quite relevant and essential to this
14 proceeding. Arizona law is clear that the Commission must consider the public interest
15 implications of its decision in granting certificates of convenience and necessity
16 ("CCN"). See A.R.S. § 40-282(C) (stating that the Commission may issue or refuse to
17 issue a CCN as "the *public* convenience and necessity require") (emphasis added);
18 *Arizona Corp. Com'n v. Woods*, 171 Ariz. 286, 830 P.2d 807 (1992) ("The Commission
19 is *required* to use [its] powers to regulate public service corporations *in the public*
20 *interest.*") (emphasis added).

21 In fact, public interest is the controlling consideration, and the Commission should
22 only grant a CCN if it finds it would serve the public interest. *James P. Paul Water Co.*
23 *v. Arizona Corp. Com'n*, 137 Ariz. 426, 429, 671 P.2d 404, 407 (1983); see also *Arizona*
24 *Corp. Com'n v. Tucson Ins. and Bonding Agency*, 3 Ariz.App. 458, 463, 415 P.2d 472,
25 477 (1966); *Davis v. Corp. Com'n*, 96 Ariz. 215, 218, 393 P.2d 909, 911 (1964). The
26

1 Commission should examine all available evidence to determine whether the CCN is
2 detrimental to the public interest. *Pueblo Del Sol Water Co. v. Arizona Corp. Com'n*, 160
3 Ariz. 285, 286, 772 P.2d 1138, 1139 (Ct. App. 1988).

4 While the Commission considers the public interest in each of its decisions, such
5 consideration is particularly appropriate in this case. In every essence, Sempra's
6 application is a request that the Commission reinstitute retail electric competition in
7 Arizona. It cannot be characterized as anything else. As set forth in the testimony,
8 almost every state that began retail competition has either halted its expansion or reverted
9 to vertically integrated service. In those states that have continued, significant work is
10 ongoing to address the many defects and deficiencies of the deregulation schemes that
11 were established in the 1990s.

12 The structure for competition that was envisioned in Arizona and elsewhere during
13 the 1990s has been proven to be a recipe for failure. Fortunately for Arizona, the
14 Commission in the early 2000's reversed course and Arizona has operated quite
15 successfully since. Arizona customers were for the most part spared the horrors that
16 customers have seen in other states.

17 Sempra has elected to file its application for a CCN prior to completion of the
18 "comprehensive review of all Electric Competition Rules" which the Commission stated
19 was necessary in light of its 2002 Track A decision. (Decision No. 65154, p. 26, ll. 1-2.)
20 Sempra also has filed its Application before the Commission has concluded its review of
21 rules and policies in the wake of the Court of Appeals decision in *Phelps Dodge Corp. v.*
22 *Ariz. Elec. Power Coop.*, 207 Ariz. 95 (2004). Because Sempra has filed prematurely,
23 the RUCO and New West testimonies note numerous policy areas—such as Integrated
24 Resource Planning, Standard Offer Service rate design, assessment of technical and
25 financial capabilities of applicant ESPs and other matters—which would be adversely
26 impacted by the improvident or premature grant of a CCN in these circumstances. That

1 is precisely the kind of testimony which is most relevant and material to the “public’s
2 interest.”

3 As stated in *Pueblo Del Sol Water Co.*, the Commission should consider *all*
4 relevant evidence in making its determination. The testimony of Steven Ahearn, Frank
5 Graves and Peter Fox-Penner are particularly appropriate to this case and to the public
6 interest of the State of Arizona.

7 **B. Sempra’s Argument is Incorrect**

8 To counter this logical argument Sempra asserts that the Commission is precluded
9 from considering the public interest impact of its decision because this issue is foreclosed
10 to the Commission by A.R.S. §§ 40-207 and 40-208. Specifically Sempra argues:

11
12 Indeed, NWEA/RUCO are, in effect, asking the Commission to rule on the
13 question of whether there should be retail direct access available in Arizona at all.
14 The postulation of that question ignores the express language of A.R.S. §§ 40-207
15 and 40-208. More specifically, Arizona law already provides for retail direct
16 access and thus, the penumbra of issues raised in the NWEA/RUCO testimony are
17 clearly beyond the scope of SES’s application and are irrelevant and should not be
18 made a part of the record in this proceeding.

19 This and similar statements in Sempra’s motion are wrong. The legislature has not
20 preempted the issue, nor could it do so.

21 First, we look to the legislation itself. The relevant amendments to Title 40 were
22 added to the law as part of the Electric Power Competition Act in 1998 [cite]. This was
23 well after the Commission had first adopted its rules for electric competition. The
24 purpose of the legislation was to “confirm” existing Commission authority. In other
25 words, the legislation was intended to fill any gaps that might exist in the Commission’s
26 existing authority. This intent is evidenced by the wording in A.R.S. § 40-202 where the
legislature specified that the Commission’s “authority is confirmed” to take steps to
deregulate retail electric service. A.R.S. § 40-202(B) and (C).

1 Second, the Commission clearly is not foreclosed by the provisions of Title 40 in
2 considering the broad public interest implications of this Application. As noted
3 previously, substantive market, regulatory and appellate developments have post-dated
4 the passage of the Electric Power Competition Act and the passage of the last version of
5 the Rules in March 2001. The RUCO and New West testimonies note the ramifications
6 of these developments and, in the main, discuss several disadvantages of proceeding with
7 ad hoc certifications prior to assessing their policy impacts. That is clearly highly-
8 relevant and material testimony going directly to the core issue: the public interest.

9 Finally, the Sempra motion assumes a tension between the statute and
10 Commission action that does not exist. If the Commission considers it prudent not to
11 place the cart (a Sempra CCN) before the horse (the “comprehensive review” the
12 Commission has stated is needed), that does not place the Commission and Legislature at
13 odds. Indeed, it’s consistent with the authority “confirmed” in A.R.S. § 40-202.

14 **C. The Testimonies Demonstrate That Granting Sempra’s Application is not in**
15 **the Public Interest**

16 The testimonies sought to be stricken by Sempra conclusively and convincingly
17 demonstrate that granting Sempra’s application at this time is not in the public interest.
18 Set forth below are some excerpts of the testimony that address this point:

19 *Testimony of Steve Ahearn (RUCO)*

20 “The existence of a competitive retail option that allows both the departure and return
21 to the incumbent utility of customers experimenting with retail access complicates
22 Integrated Resource Planning and the Commission’s ability to set and achieve
23 important societal goals derived from the IRP process.” (*Ahearn Testimony at 5:15-19*)

24 “If the Commission finds that widespread retail competition is not in the public
25 interest, there is no reason to allow a small handful of competitors to obtain
26 certificates. The competitors would be expected to pick the “largest cherries” first,
thus it is the first competitors that would likely make the largest contribution to the

1 spiral of increased rates for remaining customers. The public interest would be better
2 served by preventing any retail competition.” (*Ahearn Testimony at 8:9-16*)

3 *Testimony of Frank Graves (New West Energy)*

4 “[In Arizona] many of [the] important aspects of designing a viable program of retail
5 choice have not been adequately considered. Given the widespread frustration that has
6 been experienced elsewhere with retail access – so much so that many states are
7 considering rescinding it – it would seem prudent for Arizona to be more methodical
8 about laying the foundations for this complex, but potentially beneficial market
9 arrangement.” (*Direct Testimony of Frank Graves (“Graves Testimony”) at 7:4-9*)

10 “Standard Offer Service Design - (SOS), more broadly referred to as Provider of Last
11 Resort Service, or POLR, . . . is the backup service that utilities or specially
12 designated suppliers must provide for customers who have not elected to use or stay
13 with an ESP. [To implement SOS] all the major elements of its design must be
14 carefully and consistently specified, including customer class differentiation,
15 switching rights, term (horizon), pricing rules, procurement mechanisms, and
16 regulatory approval guidelines. This has not yet happened in Arizona. In particular,
17 existing generation tariffs were not developed with the intent or effect of
18 compensating the utilities for the costly risks associated with customer switching.
19 Thus, these prices do not provide a fair or efficient SOS price for prodigal ESP
20 customers.” (*Graves Testimony at 4:22 – 5:11*)

21 “If utilities and ESPs are to bear joint (and shifting) responsibility for assuring an
22 adequate power supply for electricity customers, there must be clarity about how
23 long-term resource decisions are to be made, and how the needed assets can enjoy
24 cost recovery that is fair to all customers and financially secure for the developers or
25 contractors. From the social-cost perspective of utility regulation, a supply portfolio
26 that includes diverse resource, including renewables and efficiency programs, may be
preferred, but this may not be the supply mix chosen under the private criterion of
ESP. The traditional regulatory practice of Integrated Resource Planning becomes
extremely difficult when a material portion of the utility’s demand could migrate
away (or return) within time periods much shorter than asset lives. Customer choice
may be antithetical to any expectation that such regulatory scrutiny of asset choices
can occur.” (*Graves Testimony at 5:24 – 6:10*)

“The ACC must develop procedures for assessing the technical and financial
capabilities of proposed ESPs. Beyond this, it must have some monitoring of the
extent of competition in retail services, with means of protecting customers when
competitive conditions are poor. At present, only one ESP has come forward to be
certified. Both the utilities and ESPs will need clarity on ACC market oversight in
order to proceed confidently with their plans. However, the ACC cannot expect to
have utility-style regulatory control over competitive ESPs as to their tariffs, asset

1 mixes, or business strategies, as that will quash the market.” (*Graves Testimony at*
2 *6:17-25*)

3 *Testimony of Peter Fox-Penner (New West Energy)*

4 “It is imperative . . . that whether a state adopts choice or remains under rate
5 regulation, it be extremely careful to create policies that are consistent with enabling
6 success with the structure it creates. For retail choice states, this includes ensuring a
7 competitive structure at both the wholesale and retail level, which in turns means
8 adequate transmission capacity and access, among other things; adequate demand
9 response; appropriate last-resort pricing and customer supplier shift policies; and
careful formulation of policies to meet other critical state energy goals, including
renewable energy, fuel diversity, and energy efficiency. The state needs the resources
to police its competitive framework as well.” (*Direct Testimony of Peter Fox-Penner*
10 (*“Fox-Penner Testimony”*) at P.13)

11 “[Retail electric competition in the United States] was rushed into existence with
12 vastly oversold expectations, inadequate legal and regulatory authority, and
13 inadequate infrastructure. In addition, both retail and wholesale markets were poorly
designed, including provisions for last-resort service that made competition
unworkable regardless of other challenges to the markets.” (*Fox-Penner Testimony at*
14 *P.2*)

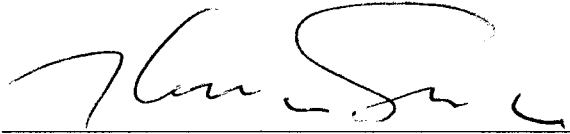
15 “California, Nevada, and Montana, have all decided to restrict retail access to
16 “grandfathered” customers and/or to large customers. Virginia decided to fully re-
17 regulate its electric market. Other states, such as Maryland, Delaware, and Maine are
18 considering whether their utilities should get back into the business of building
generating plants to “self-provide” at least a portion of their power supply
requirements (and therefore reduce their reliance on wholesale power markets).”
19 (*Fox-Penner Testimony at PP.4-5*)

20 **Conclusion**

21 Sempra asks the Commission to ignore competent and compelling testimony
22 relating to the effects of a Commission decision in this docket and its impacts on the
23 public interest. New West Energy respectfully requests that the Commission deny
24 Sempra’s motion to strike.
25
26

1 RESPECTFULLY SUBMITTED this 7th day of December, 2007.

2 JENNINGS, STROUSS & SALMON, P.L.C.

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